



American Payroll Association

Government Relations • Washington, DC

May 8, 2014

Jim Preckwinkle
Illinois Department of Labor
900 S. Spring Street
Springfield, IL 62704

Re: Notice of Proposed Amendments to Rules Implementing the Illinois Wage Payment and Collection Act.

Dear Mr. Preckwinkle:

The American Payroll Association (“APA”)¹ appreciates the opportunity to submit the following comments in response to the Illinois Department of Labor’s (the “Department”) March 28, 2014, Notice of Amendments. The Notice includes proposed amendments to several of the Department’s rules implementing the Illinois Wage Payment and Collection Act, including the rule governing direct deposit.² By way of this letter, the APA offers the following comments with respect to a proposed amendment to the direct deposit rule adding standards for the payment of wages using payroll cards (“Proposed Rule”).

Payroll cards offer a valuable solution for underserved workers

Electronic wage payment methods offer numerous benefits to employees and employers alike. These benefits include increased security and convenience, as well as cost savings. In addition, electronic wage payment allows employers to deliver wages to their employees in a timely manner in situations where delivery of paper paychecks is inconvenient or even impossible – for example, when an employee is away from the work place or during severe weather conditions, natural disasters, and similar unexpected contingencies.

A surprisingly large number of workers are unable to participate in direct deposit, however, because they do not have bank accounts or have limited access to traditional banking services. A 2011 study by the FDIC revealed that 7.1% of all Illinois households are unbanked and another

¹The APA is a nonprofit professional association representing more than 20,000 payroll professionals and their companies in the United States. The APA’s primary mission is to educate its members and the payroll industry regarding best practices associated with paying America’s workers while complying with applicable federal, state, and local laws. In addition, the APA’s Government Affairs Task Force works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

² 56 Ill. Admin. Code 300.600.

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17.7% are under-banked, meaning that they have a bank account but still rely on alternative financial services. In Illinois, currency exchanges may charge check cashing fees equal to 2.25% of an employee's paycheck,³ or more than \$337 a year for a minimum wage earner working 40 hours a week.

Many consumer advocates and government regulations agree that payroll cards offer a valuable solution for underserved workers. For example, in a recent OpEd, Javier Palomarez, President and CEO of the United States Hispanic Chamber of Commerce, emphasized that: "Payroll cards offer those with no banking access a dependable option for protecting their finances. Empowering our citizens with this much needed access, security, and convenience of prepaid payroll cards allows the unbanked to save more of what they earn and helps them build a solid financial foundation."⁴

The Proposed Rule relating to payroll cards is premature at this time.

The Wage Payment and Collection Act (Act or WPCA) governs the payment of wages to workers in Illinois. Among other things, section 4 of the Act identifies the methods employers may use to deliver wages to their employees. While the Act addresses direct deposit generally, it does not specifically mention payroll cards. This is likely to change in the near future, as the Illinois Legislature is considering the appropriate standards for the use of payroll cards in Illinois through House Bill 5622 (HB 5622). HB 5622 passed the House on April 10, 2014, and is beginning to make its way through the Senate. If enacted, the bill will take effect on January 1, 2015.

While the Director of Labor is authorized to promulgate rules and regulations necessary to administer and enforce the WPCA,⁵ it is premature to issue regulations on payroll cards. An administrative agency's regulations must be consistent with the legislative purpose and intent of the statute it implements or interprets.⁶ The Illinois courts recognize that "[u]ppermost in determining the validity of a regulation is whether it furthers the legislative intent as discerned from the statute."⁷ In light of these principles, it is hard to imagine how the Department could possibly implement rules relating to the use of payroll cards before the legislative intent on the issue has been expressed.

Moreover, promulgation of rules relating to payroll cards while the Legislature is considering the issue would be highly inefficient and disruptive to both employers and employees. The proposed rules could become effective as soon as late June or early July, 2014.⁸ Requiring employers to modify their existing programs to comply with the regulations and then to modify their programs again on January 1, 2015, if HB 5622 is enacted would serve no purpose or benefit. To the contrary, it would impose a considerable burden on all parties involved.

To the extent that any rules are promulgated relating to payroll cards, employers and program managers should be given sufficient time to revise their current policies and practices consistent with the new rules.

³ 38 Ill. Admin. Code § 130.30.

⁴ <http://www.huffingtonpost.com/javier-palomarez/payroll-cards-a-valuable-b-4555801.html>
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For another excellent discussion of payroll cards from an organization committed to protecting low wage earners, see Benjamin Mangan, *Stop Blacklisting Payroll Cards for Worker*, <http://www.linkedin.com/today/post/article/20130710205603-132220-stop-blackballing-payroll-cards-for-workers>.

⁵ 820 ILCS § 115/12.

⁶ *Board of Education v. Eckmann*, 432 N.E.2d 298 (Ill. App. Ct. 1981).

⁷ *Chicago Transit Authority v. Department of Human Rights*, 523 N.E.2d 1108, 1111 (Ill. App. 1988).

⁸ See, 5 ILCS § 100/5-40.

Payroll cards should be treated like other wage payment methods; employees who receive wages on a payroll card must be able to cash out their net wages for the pay period at a bank or financial institution without cost.

Under the WPCA, employers are responsible for ensuring that their employees are provided with the timely and complete payment of their earned wages.⁹ Consistent with this policy, the Act requires that paper paychecks be “redeemable upon demand and without discount at a bank or other financial institution readily available to the employee.”¹⁰ Similarly, the IDOL’s website currently states that employees who choose to accept wages on a payroll card “must be able to deposit and/or obtain the full monetary value on the payroll card without discount.” Indeed, virtually every state that has addressed the issue requires that employees be provided the opportunity to make one withdrawal each pay period without cost that provides access to the employee’s full net wages. **In other words, employees must be able to treat their payroll cards like a plastic paycheck and cash out their net wages each pay period without cost.**

The proposed rule deviates from the above standard by requiring that employees be provided with full and free access to their wages *at an ATM*. Specifically, the proposed rule would require employers to “[e]nsure that the employee is able to deposit/and or obtain the full monetary value of his or her wages on the payroll card, without fees, and at an ATM readily available to the employee.” “Readily available to the employee,” in turn, is defined to mean that the ATM “is within a reasonable proximity of the employee’s home or place of employment and there must be at least two such locations available.”

This is an impossible standard for employers to satisfy. An employee cannot access his or her full wages for a particular pay period, to the penny, at an ATM any more than an employee can cash his or her paycheck at an ATM or withdraw his or her full wages, to the penny, from an ATM after wages have been directly deposited. This is because most ATMs only distribute funds in \$10 or \$20 increments.

In contrast, employees *can* access their full wages for each pay period from the teller at financial institutions without cost. Thus, **the same standard that applies to paper paychecks – the ability to cash out their net wages for the pay period at a bank or financial institution readily available to the employee – should apply to payroll cards.**

The vast majority of payroll cards are branded meaning that they bear the logo of a major payment brand such as Visa or MasterCard. Employees can take their payroll card to any financial institution location that is a member of the payment brand – not just the financial institution that issued the card – and receive their full wages at least once each pay period without cost. This is significantly more convenient than the one location that must be provided with respect to paper paychecks.

Further, the term “reasonable proximity” is ambiguous and may invite conflicts of opinion and complaints, which may add to the Department’s adjudication workload. Moreover, defining “readily available” in relation to ATM proximity is not helpful since, as described above, ATMs cannot be used to satisfy the full and free access rule.¹¹ Employees *can* access their full net

⁹ See, e.g., *Miller v. Kiefer Specialty Flooring, Inc.*, 739 N.E.2d 982, 986 (Ill. App. 2000).

¹⁰ 820 ILCS § 115/4.

¹¹ Even if proximity to ATM location were relevant, it would be difficult administratively for employers to track on an ongoing basis the precise location of ATMs relative to each employee work or home location. Telecommuters in particular appreciate the benefit of payroll cards, which make it unnecessary to drive to the workplace to pick up a paper check. However, requiring employers to track and disclose this information for each telecommuter may discourage employers from offering payroll cards to telecommuting and similarly situated employees. To avoid a conflict with the propose requirement under

wages without cost at any financial institution that is member of the Visa or MasterCard payment network.

Finally, as a minor point, the word “deposit” in paragraph (c)(1) should be replaced with “transfer.” We assume that the Department wanted to ensure that workers have the ability to transfer funds from their payroll card account to a checking or savings account (if they have one).

If the Department moves forward with the Proposed Rule, the proposed disclosure requirements should be clarified.

Paragraph (c)(2) of the proposed regulations would require employers to provide a number of written disclosures to their employees including the features of the payroll card, the fees and other rules associated with the payroll card, and the locations at which the employee may withdraw the full amount of his or her net wages without fee. While this requirement is reasonable in most respects, it goes too far to the extent that it requires employers to provide the disclosures “in a manner and language understandable to the employee.” Such “comprehension standards” are extremely subjective and difficult to enforce. In fact, we could find no similar requirements attached to any other employer notice and disclosure provisions in Illinois. A better alternative would be to require that disclosures be provided “in a clear and conspicuous manner and in language(s) the employer normally uses to communicate employment-related policies to its employees.”

The APA also requests clarification with respect to the requirement that the employer disclose “the locations at which the employee may withdraw the full amount of his or her wages without fee.” Does this mean that the employer must disclose the location of every bank that is a member of the Visa or MasterCard payment network? Such a requirement would be voluminous and overly burdensome. Should the Department move forward with its Proposed Rule, we respectfully request that it clarify that the disclosure requirement may be satisfied by notifying employees that they can access their full net wages each pay period through one withdrawal at any financial institution that is a member of the Visa or MasterCard payment.

The Proposed Rule goes too far to the extent that it would hold employers strictly liable for unauthorized use of a lost or stolen payroll card.

The proposed rule would require employers to replace a lost or stolen payroll card within ten days after written notification from the employee. The rule goes on to state that “if a payroll card is lost or improperly accessed, the card and the existing balance that was not accessed by the employee must be subject to replacement without fees to the employee.”

The above provision inappropriately holds the employer strictly liable for any unauthorized use of an employee’s payroll card without requiring or even encouraging the employee to take steps to limit or avoid unauthorized use. Under the proposed rule, an employee could write his or her PIN on the card, give it to a stranger, report the card lost 5 months later, and then expect the employer to replace any and all missing funds. Rather than promoting healthy financial behavior and decision making, this rule would invite careless behavior and fraudulent claims by employees.

section 300.600 (when the employer offers to any of its employees alternative options for receipt of payment of wages, all employees must be afforded the same options), employers may simply not offer payroll cards to any workers.

Federal Regulation E already addresses unauthorized transfers and strikes an appropriate balance between the interests of the cardholder and the financial institution. For example, Regulation E limits cardholder liability for unauthorized transfers but requires the cardholder to report the card as being lost or stolen within specified time periods.¹² The protection does not cover instances where the employee has given his or her card to a third party unless the employee has notified the financial institution that transfers by that person are no longer authorized. In addition to the Regulation E protections, the networks' (i.e., MasterCard and Visa) zero-liability policies provide additional protection against unauthorized use when a card is lost or stolen.

In light of the existing protections against unauthorized use, further regulation by the Department is unnecessary and, as drafted, goes too far.

The Proposed Rule's prohibition on making the electronic payment of wages a condition of hire or continued employment goes beyond the plain language and legislative intent of the Act.

If adopted, the proposed rule would prohibit employers from making electronic payment methods, both direct deposit and payroll cards, a condition of hire or continued employment. This provision goes beyond implementing or interpreting the WPCA and imposes a new requirement on the use of electronic payment methods.

The WPCA permits direct deposit to “a bank or other financial institution designated by the employee.” It goes on to state that “no employer may designate a particular financial institution, bank, savings bank, savings and loan, or currency exchange for the exclusive payment or deposit of a check for wages.”¹³ Thus, on its face, the only requirement imposed on direct deposit by the WPCA is that the employee be able to designate the financial institution that will receive his or her wage deposit.

Importantly, the direct deposit language of the WPCA echoes the compulsory use provisions of the federal Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E. In fact, the same year that the Illinois Legislature added the direct deposit language to the WPCA it also enacted its own version of the Electronic Fund Transfer Act and expressly incorporated the provisions of the federal EFTA and any regulations issued thereunder into its statutes.¹⁴

Although the compulsory use provisions of the EFTA and Regulation E (like the WPCA) prohibit employers from designating a particular financial institution for the direct deposit of wages, the Official Commentary to Regulation E makes clear that “[a]n employer may require direct deposit of salary by electronic means if employees are allowed to choose the institution that will receive the direct deposit.”¹⁵ A payroll card account is considered to be an account for purposes of the EFTA and Regulation E.¹⁶ Thus, for employers that offer direct deposit, the payroll card simply represents another choice of financial institution into which the employees' net wages can be deposited. The Board Governors of the Federal Reserve System has explained:

¹² Under the EFTA and Regulation E, an employee's liability is limited to \$50 (if the loss or theft is reported within 2 business days of learning of the loss or theft) or \$500 (if reported after), with the possibility of unlimited liability for untimely notice to the financial institution (normally after 60 days of learning of the loss or theft).

¹³ 820 ILCS § 115/4.

¹⁴ 205 ILCS 615/55(a).

¹⁵ Supplement I to Regulation E – Official Interpretations, §10(e)(1).

¹⁶ 71 Federal Register 1473 (January 10, 2006).

Provided that an employer does not require a consumer to obtain a payroll card account as the method of receive pay, and permits for example, a consumer to receive pay via direct deposit to a financial institution, the compulsory use provision should not be implicated.¹⁷

Like the federal EFTA and Regulation E, the WPCA simply requires that the employee be able to designate the financial institution that will receive his or her wages. The proposed rule goes beyond the plain language of the Act, and therefore its legislative intent, by prohibiting employers from making electronic wage payment a condition of hire or continued employment.

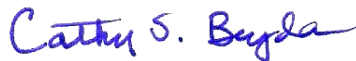
If the Department moves forward with the Proposed Rule, employers should be provided with sufficient time to honor an employee's request to change payment method.

Under paragraph (c)(4) of proposed section 300.600, employees must be able to revoke their authorization to payment using a payroll card. In the event that the IDOL moves forward with the proposed rulemaking, a statement should be added to this paragraph giving employers sufficient time to implement the employee's request. For example: "The employer shall begin payment to the employee using the alternative method within two pay periods of the employee's request."

Conclusion

The APA appreciates the opportunity to comment on the Department's Proposed Rule regarding payroll cards and would welcome the opportunity discuss the above issues with you further. In this regard, please feel free to contact Cathy Beyda (650-320-1824) or Bill Dunn (202-232-6889) with any questions or concerns that you may have.

Sincerely,



Cathy Beyda, Esq.
American Payroll Association
Chair, Paycard Subcommittee, Government Affairs Task Force



William Dunn, CPP
American Payroll Association
Director of Government Relations

¹⁷ Section by Section Analysis to Interim Final Rule on Electronic Fund Transfers, 71 Fed. Reg. 1473, 1479 (Jan. 10, 2006).